

No. 81202-1

SANDERS, J. (dissenting)—The majority holds that Gerald Kingen and Scott Switzer willfully failed to pay their employees when the bankruptcy court converted Funsters Grand Casino’s chapter 11 reorganization to chapter 7 liquidation, thereby seizing Funsters’ assets and not permitting unpaid wages to be satisfied. Majority at 3, 11. The majority fails to recognize chapter 7 bankruptcy as a defense to negate the finding of willfulness. Majority at 7. More importantly the majority fails to recognize that the issue here is willfulness and that a party must have some control and be a free agent to be willful. Therefore I dissent.

The majority incorrectly relies on *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 961 P.2d 371 (1998). In *Schilling* the employer was not in bankruptcy but chose to not pay his employees so he could pay off other debts. *Id.* at 155. When selling his business the employer promised the buyer that he would satisfy all debts, including past wages, by closing or the amounts still owed would be deducted from the sales price. *Id.* The employer set aside money to pay the past wages but then used some of it to settle a lawsuit, so he did not have enough money remaining to pay the employees. *Id.* at 156. When an unpaid employee brought suit, the employer argued he was financially unable to pay. *Id.* at 163-64. The court however held that the

employer willfully and intentionally failed to pay his employees because he volitionally chose to pay creditors over employees. *Id.* at 165.

Here Kingen and Switzer did not choose to pay certain creditors over their employees. Instead the bankruptcy court seized all of the company's assets, not allowing them to pay their employees. They initially filed for chapter 11 bankruptcy, which would allow them to reorganize and pay their employees, but this was converted to chapter 7 liquidation by the bankruptcy court.

The majority incorrectly asserts that we previously suggested in *Schilling* "that a corporation's insolvency does not negate a finding of willfulness." Majority at 10. It comes to this conclusion because we said in *Schilling* that Bingham never proved insolvency or a financial inability to pay. *Schilling*, 136 Wn.2d at 164 n.5. However we never reached the issue of whether insolvency negates willfulness. We merely asked, "[m]ust the employer be insolvent to the point of being eligible for bankruptcy to meet the test?" *Id.* at 164. But the question was never answered, and now we have an opportunity to do so.

The critical issue is whether an employer's failure to pay employees was willful under RCW 49.52.070. *Id.* at 159. Whether an employee acts willfully and with intent is a question of fact reviewed under the substantial evidence standard. *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 660, 717 P.2d 1371 (1986). As the dissent in *Schilling* articulated, "we should apply RCW 49.52.050(2) and .070 to the facts before us in a

commonsense manner, uninhibited by prior decisions applying the term ‘willfully’ in distinguishable factual circumstances.” *Schilling*, 136 Wn.2d at 169 (Alexander, J., dissenting). The majority fails to do that.

Willful “means merely that the ‘person knows what he is doing, intends to do what he is doing, and is a free agent.’” *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969) (quoting *Davis v. Morris*, 37 Cal. App. 2d 269, 274, 99 P.2d 345 (1940)). “The nonpayment of wages is willful when it is the result of a knowing and intentional action.” *Lillig*, 105 Wn.2d at 659. The majority incorrectly holds that Kingen and Switzer willfully failed to pay their employees. In fact the assets of Funsters were seized, and they could not pay their employees even if they had wanted to pay them. The bankruptcy court’s conversion of the proceeding negated Kingen’s and Switzer’s willingness to pay.

Kingen and Switzer are not asserting the defense of financial inability to pay. Instead they could not legally pay their employees after the bankruptcy proceeding was converted. Their failure to pay was not volitional or willful but rather court-imposed.

Therefore, I dissent.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson

Dennis J. Sweeney, Justice Pro
Tem.
